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IN THE

Supreme Court of the United States

No. 74-1460

RICHARD G. AUGENBLICK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY MEMORANDUM OF PETITIONER

JOSEPH H. SHARLITT

1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Counsel to Richard G. Augenblick

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The Government's Response is singular in its cursory sweep of generalities.

(1) *Procedural:* The first of the Government's broad fiats is: "The Petition No. 74-1460 was not filed until May 20, 1975, and accordingly, is jurisdictionally out of time under 28 U.S.C. 2101(c), *Department of Banking v. Pink*, 317 U.S. 264," (Government's Memorandum, p. 4.)

In the metaphysical definition of when the time for the filing of a Petition for a writ of certiorari runs (which may

or may not differ from the date of the finality of an order below – the cases are simply unclear), one thing is clear: *Pink* is not the final word.

Pink simply held that the ministerial act of a trial court's subsequent entry of judgment pursuant to an earlier clear, unstayed, final mandate from a Court of Appeals will not interfere with the running of the 90 day period for filing a petition from the Court of Appeals judgment. But in *Augenblick* there was no dismissal of this action – no final judgment in this cause – until February 21, 1975, well within the 90 days from the filing of the petition herein on May 20th. This was because the Court of Claims stated:

> "that the order of April 4, 1969, dismissing the petition should go into effect in thirty days."[1]

Whatever semantical distinctions the government wishes to make concerning the differences between a final order and one from which a Petition may be filed lead nowhere in light of *Commissioner of Internal Revenue v. Bedford*, 325 U.S. 283 (1945). There the Second Circuit ordered

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[1] The entire dispositive portion of the January 22, 1975 opinion states:

> "We hold, for these reasons, that plaintiff's motion for leave to file a second amended petition and for relief from judgment should be denied; that defendant's motion to lift the stay of proceedings and to deny further relief should be granted; and that the order of April 4, 1969, dismissing the petition should go into effect in thirty days.[13] (Slip opinion, p. 8.)

Footnote 13, there alluded to, states:

> "[13]Our order of October 31, 1969, stayed our order of April 4, 1969, until thirty days after action of the motion for leave to file the second amended petition.

that a mandate issue, and the clerk obediently did so. This Court held that the time for filing a Petition to it ran from the later date of the issuance of the mandate, rather than from the earlier date of the otherwise final unstayed, but totally dispositive decree.

At best, the beginning point for Petition time before this Court – in review of orders not yet final – is uncharted territory where nothing is totally clear.

Next, the Government tells us "This order of 'stay' does not affect the date of the entry of judgment, but rather is in the nature of the ordinary delay" (pursuant to the Federal Rules of Appellant Procedure) "in the issuance of mandate on the judgment."[2] But, of course, the Court of Claims is a trial Court which ordinarily simply enters judgment but does not issue mandates to other courts. It has no "ordinary" delays for the issuance of such mandates because it ordinarily does not issue mandates.

There was nothing ordinary about the entry of the judgment below. Not once, but twice the Court below stated that its determination on Plaintiffs' Second Amended Petition (which determination is now before this Court) would be stayed until 30 days after it had ruled. First this was done in that Court's Order of October 31, 1969 (supra, footnote 1). The Court then did precisely the same thing again in its January 22, 1975 opinion. Although it is not clear why that Court did it that way, that is the way that the Court did it. And in consequence the stay of the only final action in this case, dismissal of Plaintiff's Complaint, was in effect until February 21, 1975. 88 days later the present Petition was filed with this Court. To state, as the Government does at p. 4 of

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[2] Government Memorandum, p. 4.

its Memorandum that "the judgment" (of January 22) "was final when it was entered, although its effectiveness was postponed for 30 days" is Lewis Carroll brought alive for any lawyer who has braved the looking-glass world of final orders.

The Government creates a diversion and a game here, where neither belongs. Five years, eight months ago this Petitioner filed a petition for a writ with this Court raising the matters which were then and are now before this Court. This Court followed an unusual course -- for it -- delaying its own action for those five years and eight months "pending", as this Court specifically stated "filing of certiorari to review action of the Court of Claims upon (petitioner's) motion of July 14, 1969 in that Court."[3] Thus this matter was not newly before this Court on May 20, 1975. It was, rather, the renewal of an earlier Petition already before this Court, specifically stayed by this Court, delayed while Petitioner on three occasions unsuccessfully urged the Court below to bring the case to decision, finally here again for the review specifically envisaged by this Court when it took its action in this case 5-2/3 years ago. It would be, indeed, making a game of this Court's procedures to deny review of this case against this history on the murkiest of procedural grounds.

(2) *Substantive:* The Government brushes lightly past the question of notice to the Defendant raised by the Petition herein. It states at page 5 of its Memorandum that Article 134 was a "recognized lesser included offense" within Article 125 (of which this Petitioner was acquitted). But the very Manual for Courts' Martial (in effect at the

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[3] Letter of the Clerk to parties, October 27, 1969, quoted, Government Memo, p. 3.

time of Petitioner's court-martial) which is used by the Government[4] to demonstrate that "indecent, lewd and lascivious acts" was a "specification" under Article 134 states quite clearly in another section there were then *no* lesser included crimes within Section 125. There was, to be sure, a caveat against automatic use of that section, but no more so than the caveat regarding any of the Navy's "specifications" – which are wholly apart from statute and can be brought into being, modified or dropped at the whim of the Service.

In short, there was nothing "recognized" about Section 134's status in 1961 as a "lesser included crime" within Section 125 except that the Navy recognized that it was not. This is far, very far indeed, from constitutional notice of the crime for which a Defendant is charged. This is a very far cry from the constitutional requirement of certainty of inclusion that would inform a Defendant charged with Section 125 that he is in jeopardy of a conviction under Section 134 – so that he could defend.

The Government's off-hand treatment of this issue deals more with what is *not* being argued by this Petitioner that it does with what is being argued. To set the record straight, both points are delineated in the Petition at p. 25-26.

Finally, the conduct of the Court of Military Appeals. The Government sees no impropriety in the spectacle of two judges of that Court actively influencing the military establishment and the Department of Justice to seek reversal of a particular judgment in the Court of Claims in order to "see their original position vindicated in the Supreme Court." (Government Memorandum, p. 7.) We

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[4] Page 5, paragraph 3 of its Memorandum.

await the day when District Court judges and their agents fill the halls of federal agencies and the Department of Justice seeking vindication "of their original position" in the Supreme Court. We await the day when such judges then sit in judgment of the same defendants whose fate in various Court of Appeals brought about the need for such "vindication". We await that day with considerable loathing. This kind of activity has nothing to do with the administration of justice. It is not open testimony before Congress. It is covert,[5] it deals with a particular case which may (and did) reappear before these same judges, and it converts those who lobby into hidden adversaries of the litigant. For judges who deal only with the military establishment it is the essence of what the following two canons of the Code of Judicial Conduct are all about:

Canon 2: A judge should avoid impropriety and the appearance of impropriety in all his activities.

Canon 5: A judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties.

Respectfully submitted,

Joseph H. Sharlitt, Esquire
Attorney for Petitioner

1747 Pennsylvania Avenue
Suite 300
Washington, D.C. 20006
785-9750

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[5] As are extrajudicial activities of a Court, carried on where a party cannot respond. See Petition, p. 39.